No. 951906 MAY 23 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

LISA SIMOTAS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

10288

QUESTION PRESENTED

Whether a court sentencing a defendant for the offense of conviction may consider conduct underlying a charge of which the defendant was acquitted.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and Regulations:

Sentencing Guidelines:

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Watts* (App., *infra*, 1a-17a) is reported at 67 F.3d 790. The order

denying a petition for rehearing (App., *infra*, 39a-40a) is reported at 79 F.3d 768. The order denying respondent's petition for a writ of certiorari is reported at 116 S. Ct. 1369. The opinion of the court of appeals vacating the sentence in *Putra* (App., *infra*, 18a-38a) is reported at 78 F.3d 1386. The opinion affirming Putra's conviction (App., *infra* 41a-51a) is unpublished.

JURISDICTION

The judgment of the court of appeals in *Watts* was entered on September 28, 1995, and the order denying rehearing was entered on January 24, 1996. App., *infra*, 39a. By order dated April 12, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 23, 1996. The judgment of the court of appeals in *Putra* was entered on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Section 3661 of Title 18 of the United States Code, and the pertinent provisions of Sections 1B1.3, 1B1.4, and 2D.1 of the Sentencing Guidelines are reproduced at App., *infra*, 52a-79a.

STATEMENT

1. *Watts.* After a jury trial in the United States District Court for the Eastern District of California, respondent Watts was convicted of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was acquitted of using or carrying a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced

to 262 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed his conviction, but it vacated his sentence. App, *infra*, 1a-17a.

a. Watts was placed under police surveillance after his probation officer became suspicious that he was selling cocaine and was living with his girlfriend, Sonja Lee, rather than with his mother, as he claimed. On the day of his arrest, police officers followed as Watts drove from his probation interview to the home of Sonja Lee, where he parked and went inside. Later that day, Watts drove to another house, where he remained for about a minute. Upon leaving, he drove in a suspicious manner, using what the officers believed were counter-surveillance techniques. App., *infra*, 2a-4a.

Believing that Watts had just participated in a drug deal, the officers stopped his car. A search of the car uncovered a set of keys and a garage door opener, which were later determined to open the front door and the garage door of Lee's residence. The officers conducted a probation search of Lee's home, during which they discovered a substantial quantity of cocaine base ("crack") in a kitchen cabinet and two loaded firearms and ammunition in a bedroom closet. Lee admitted that she and Watts lived in the house together, and Watts confessed that the guns and drugs were his. App., *infra*, 4a.

b. A jury convicted Watts of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), but acquitted him of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). As sentencing, the district court, relying on Sentencing Guidelines § 2D1.1(b)(1), enhanced Watts' base offense level by two levels on the basis of his posses-

sion of a firearm. The court sentenced Watts to 262 months' imprisonment (the bottom of the applicable sentencing range), to be followed by a five-year term of supervised release. App., *infra*, 5a, 12a.

c. The Ninth Circuit affirmed respondent's conviction, but it vacated his sentence. Relying on *United States* v. *Brady*, 928 F.2d 844 (9th Cir. 1991), the court held that it was error to enhance respondent's sentence under Guidelines § 2D1.1(b)(1), because a court "sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." App., *infra*, 12a. The court reiterated *Brady*'s conclusions that it "would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted," *id.* at 13a, and that a sentencing court therefore cannot consider facts underlying an acquittal "under *any* standard of proof." *Id.* at 15a (emphasis in original). The court acknowledged that six other circuits have held that a defendant's acquittal on a charge under 18 U.S.C. 924(c) does not preclude a sentencing enhancement for possession of a firearm under Guidelines § 2D1.1(b)(1). App., *infra*, 15a-16a n.3.

The panel subsequently denied a petition for rehearing, rejecting the government's argument that its decision was inconsistent with *Witte* v. *United States*, 115 S. Ct. 2199 (1995). The government argued that *Witte* made clear that a sentencing court's consideration of criminal conduct for which the defendant was not convicted, in sentencing him for the offense of conviction, does not amount to "punishment" for the uncharged conduct. The court of appeals explained that the government did not

timely bring *Witte* to the panel's attention. App., *infra*, 39a-40a.

2. *Putra.* After a jury trial in the United States District Court for the District of Hawaii, respondent Putra was convicted of aiding and abetting in the possession of one ounce of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was acquitted of conspiracy to distribute cocaine and of aiding and abetting in the possession of five ounces of cocaine with intent to distribute it. Putra was sentenced to 27 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed her conviction in an unpublished memorandum disposition (App., *infra*, 19a, 41a-51a), but it vacated her sentence in a published opinion. *Id.* at 18a-38a.

a. The evidence at trial established that Putra's co-defendant, Vassilios Liaskos, ran a major cocaine importation and distribution operation in Honolulu, Hawaii. See Gov't C.A. Br. 5-7 (summarizing government's case). Putra was herself a cocaine dealer who purchased drugs from Liaskos. *Id.* at 10, 11. In the spring of 1992, Liaskos groomed Putra to take over his cocaine business while Liaskos went to Greece for the summer. A government witness testified that Putra and Liaskos sold him one ounce of cocaine on May 8, 1992, and five ounces of cocaine on May 9, 1992. A surveillance team watched and photographed both transactions. App., *infra*, 42a-43a; Gov't C.A. Br. 13-14, 27-28.

The jury convicted Putra on the charge arising from the May 8, 1992, sale, but acquitted her of conspiracy and of the charge arising from the May 9, 1992, sale. At sentencing, the district court found by a preponderance of the evidence that Putra was involved in the May 9 transaction, and accordingly,

determined her base offense level under the Guidelines by aggregating the cocaine involved in both the May 8 and the May 9 sales. App., *infra*, 19a. The district court explained that it was not punishing Putra for the May 9 sale, but that the May 9 transaction constituted relevant conduct under Guidelines § 1B1.3, and was therefore properly considered in determining the appropriate penalty for the offense of conviction. See 1/3/94 Tr. 6-7.

b. Relying on *Brady*, *supra*, a divided panel of the Ninth Circuit vacated Putra's sentence.[1] The majority conceded that Section 1B1.3 of the Sentencing Guidelines "indicates [that] it is proper to include the total quantity of drugs involved in the same course of conduct * * * even if the defendant is convicted of only one count." App., *infra*, 22a. The majority noted, however, that *Brady* forbids a district judge from "reconsider[ing] facts during sentencing that have been rejected by a jury's not guilty verdict," *id.* at 23a, and that the rule of *Brady* is "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." *Id.* at 24a.

---

[1] Putra was released from prison on January 12, 1996, after completing the 27-month term of imprisonment originally imposed by the district court. Putra's release does not render this case moot, because she is currently serving a three-year term of supervised release, and that portion of her sentence could be affected by further review. Under the Ninth Circuit's ruling, the district court on remand will be required to impose a shorter prison term under the Guidelines. In that event, respondent might, under Ninth Circuit law, "be entitled to an earlier end to [her] term of supervised release." *United States* v. *Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993); see also *United States* v. *Montenegro-Rojo*, 908 F.2d 425, 431 n.8 (9th Cir. 1990) (same).

In this case, the majority concluded, "by acquitting [Putra] of [the May 9, 1992] charge, the jury necessarily found that she was not involved in the possession of that cocaine," App., *infra*, 21a, and "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted." *Id.* at 23a. The majority thus found that *Brady* prohibited the sentencing court from "disregard[ing] the jury verdict on [that charge] and substitut[ing] its own factual finding." *Id.* at 24a.

Chief Judge Wallace dissented. He explained that the issue was not whether Putra could be sentenced for a crime of which she was found not guilty; rather, it was whether her sentence for the offense of conviction could be increased because of her involvement in the May 9 transaction. App., *infra*, 26a. Judge Wallace noted that under pre-Guidelines law it was clearly appropriate for a sentencing court to rely on conduct for which the defendant had been tried and acquitted in sentencing her for an offense for which she was convicted, and that the Guidelines channelled the sentencing court's discretion without eliminating that traditional authority. *Id.* at 30a-32a. Judge Wallace acknowledged that *Brady*, *supra*, and its progeny "changed [that] practice," *id.* at 32a, but he concluded that this Court's decision in *Witte* rejected *Brady*'s "core rationale" (*id.* at 33a) by making clear that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.* at 34a (emphasis deleted). In light of *Witte*, Judge Wallace argued, "*Brady* must not be considered as continuing circuit authority." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in holding that when a court imposes a sentence for the offense of conviction, it may not consider facts or conduct underlying a charge of which the defendant was acquitted. That rule conflicts with the decisions of 11 other circuits which hold that acquitted conduct may be considered in determining an appropriate sentence for the offense of conviction. The Ninth Circuit's rule also conflicts with decisions of this Court recognizing that courts may consider facts proved at sentencing by a lesser burden of proof than applies at trial, and that consideration of such facts in sentencing a defendant does not result in punishment for any offense other than the offense of conviction. Because the Ninth Circuit's rule substantially undermines the uniformity that the Sentencing Guidelines were intended to promote, these cases warrant review by this Court.

1. The Ninth Circuit's conclusion that a sentencing court may never consider conduct underlying charges of which the defendant was acquitted is at odds with the published decisions of every other regional court of appeals, all of which have concluded that a sentencing court may rely on such conduct if the government establishes it by a preponderance of the evidence.[2] Indeed, as the panel in *Watts* conceded (App., *infra*, 15a-16a n.3), every other circuit to consider the question has specifically held that a sentencing court may rely on Guidelines § 2D1.1(b)(1) to enhance the sentence of a defendant acquitted on a charge of violating 18 U.S.C. 924(c).[3]

The government unsuccessfully sought en banc reconsideration of the panel's decision in *Brady*, and again when the Ninth Circuit reaffirmed *Brady* in *United States* v. *Walsh*, 985 F.2d 577 (9th Cir. 1993) (Table). We had refrained from seeking this Court's intervention, however, because the Ninth Circuit stated in *Brady* that its rule was based on an interpretation of the Guidelines, *Brady*, 928 F.2d at 852 n.14, and it therefore appeared to raise an issue for the Sentencing Commission to address under *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991). See, *e.g.*, 94-7632 U.S. Br. in Opp., *Frias* v. *United States*, cert. denied, 115 S. Ct. 1433 (1995). The Ninth Circuit, however, not only has adhered to *Brady* in subsequent cases (see App., *infra*, 33a (Wallace, J., dissenting)), but now has

---

[2] See *United States* v. *Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992); *United States* v. *Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990); *United States* v. *Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States* v. *Isom*, 886 F.2d 736, 738-739 (4th Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989); *United States* v. *Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 500 U.S. 933 (1991); *United States* v. *Fonner*, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States* v. *Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 498 U.S. 960 (1990); *United States* v. *Coleman*, 947 F.2d 1424, 1429 (10th Cir. 1991), cert. denied, 503 U.S. 972 (1992); *United States* v. *Averi*, 922 F.2d 765 (11th Cir. 1991).

[3] See *United States* v. *Billops*, 43 F.3d 281, 288 (7th Cir. 1994), cert. denied, 115 S. Ct. 1389 (1995); *United States* v. *Meyers*, 990 F.2d 1083, 1086 (8th Cir. 1993); *United States* v. *Romulus*, 949 F.2d 713, 716-717 (4th Cir. 1991), cert. denied, 503 U.S. 992 (1992); *United States* v. *Coleman*, 947 F.2d at 1428-1429; *United States* v. *Duncan*, 918 F.2d at 652; *United States* v. *Rodriguez-Gonzales*, 899 F.2d at 180-182; *United States* v. *Mocciola*, 891 F.2d at 16-17; *United States* v. *Juarez-Ortega*, 866 F.2d at 749.

made plain "that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." App., *infra*, 24a. Because the Sentencing Commission cannot displace the Ninth Circuit's rule, and because the Ninth Circuit has twice declined to reconsider that rule en banc, only this Court's intervention can correct the Ninth Circuit's error and restore uniformity to this important area of federal sentencing law.

2. The Ninth Circuit's decisions disregard well-settled statutory and decisional authority establishing that sentencing courts have the discretion to consider a wide range of information at sentencing, including facts underlying charges for which the defendant has not been convicted.

a. In *Williams* v. *New York*, 337 U.S. 241 (1949), a defendant convicted of murder and sentenced to death challenged the trial court's reliance on information that the defendant had been involved in 30 burglaries for which he had not been convicted. This Court rejected the defendant's due process challenge to his sentence, explaining that "both before and since the American colonies became a nation, courts in this country * * * practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. The Court reasoned that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics," and that possession of such information would enable the sentencing court to impose a "punishment [that] fit the offender and not merely the crime." *Williams*, 337 U.S. at 247; see *BMW of North America, Inc.* v. *Gore*, No. 94-896 (May 20, 1996), slip op. 12 n.19 ("A sentencing judge may even consider past criminal behavior which did not result in a conviction * * *," citing *Williams*).

The principles reaffirmed by *Williams* were codified by Congress in former 18 U.S.C. 3577 (1970). See *United States* v. *Grayson*, 438 U.S. 41, 50 n.10 (1978) (noting that 18 U.S.C. 3577 was based on *Williams*).[4] Those principles were consistently applied both by this Court and by lower courts before the enactment of the Guidelines. See, *e.g.*, *Wasman* v. *United States*, 468 U.S. 559, 564 (1984) ("Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant"); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) (sentencing "judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come"). Under those principles, it was "well established that a sentencing judge [could] take into account facts introduced at trial relating to [] charges * * * of which the defendant ha[d] been acquitted." *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.).[5]

---

[4] Section 3577 provided:

> [n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

[5] See also *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) (applying pre-Guidelines law); *United States* v.

Nothing in the Guidelines or the Sentencing Reform Act of 1984 (Act) narrowed the scope of the district court's discretion in that regard. The Act recodified the former 18 U.S.C. 3577 without change, see 18 U.S.C. 3661; see also Guidelines § 1B1.4. And, consistent with pre-Guidelines case law, the Sentencing Commission defined the relevant conduct that a sentencing court must consider in determining the guideline range to include the entire scope of activities that surrounded the specific events supporting the offense of conviction. See, *e.g.*, Guidelines § 1B1.3(a)(1) (court shall determine sentence on basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" during commission of, preparation for, or attempted escape from offense of conviction). As then-Judge Breyer noted, "very roughly speaking, [relevant conduct under the Guidelines] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989), quoted with approval in *Witte*, 115 S. Ct. at 2207.

The Guidelines do not require that conduct form the basis for a conviction to be considered in sentencing for an offense. The commentary to Guidelines § 1B1.3 states that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Guidelines

---

Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979); *United States* v. *Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

§ 1B1.3 (Background). With respect to certain offenses (such as Putra's narcotics conviction), Guidelines § 1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction," and the relevant commentary explains that "[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts." Guidelines § 1B1.3 (Application Note 3). The commentary to Guidelines § 1B1.3 also observes that certain guidelines "may expressly direct that a particular [sentencing] factor be applied only if the defendant was convicted of a particular statute," but provides that "[u]nless such an express direction is included, *conviction under the statute is not required.*" Guidelines § 1B1.3 (Application Note 6) (emphasis added); see also *Nichols* v. *United States*, 114 S. Ct. 1921, 1928 (1994) (Guidelines case; reaffirming propriety of a sentencing court's consideration of "a defendant's past criminal behavior, even if no conviction resulted from that behavior"); *Witte*, 115 S. Ct. at 2205 (same).

b. The Ninth Circuit's decisions do not acknowledge the settled pre-Guidelines practice outlined above. Nor has that court identified any source of authority for its "judicial limitation" (App., *infra*, 24a) on the Guidelines provisions that incorporate the same long-standing practice. Instead, the Ninth Circuit's rule is based on the twin premises that (i) an acquittal "necessarily" represents a jury finding that the defendant "was not involved" in the conduct underlying the charge, see, *e.g.*, App., *infra*, 21a; and (ii) a court that considers acquitted conduct in sentencing for the offense of conviction "punishes" the

BEST AVAILABLE COPY

defendant for a crime of which he was acquitted. Each of those premises is flawed.

As to the first premise, this Court has repeatedly recognized that a defendant's "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984); see also *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) (per curiam). For that reason, "an acquittal in a criminal case does not preclude the Government from re-litigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling* v. *United States*, 493 U.S. 342, 349 (1990). Under the Guidelines, facts relevant to sentencing need only be proved by a preponderance of the evidence. See Guidelines § 6A1.3 (Commentary); see also *Nichols* v. *United States*, 114 S. Ct. at 1928 (due process satisfied by application of preponderance standard); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986) (same).* Thus, as one judge has phrased it, "[t]he hard logic of the differing burdens-of-proof analysis" (*United States* v. *Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., concurring in part and dissenting in part)) supports the conclusion, adopted by 11 circuits, that a defendant's acquittal on a charge at the guilt phase of trial does

*Even before the Sentencing Commission amended the Guidelines to clarify the applicable standard of proof at sentencing (see Guidelines, App. C., amend. 387), the Ninth Circuit had concluded that the preponderance-of-the-evidence standard applied to factfinding under the Guidelines. See *United States* v. *Restrepo*, 946 F.2d 654, 656 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961 (1992). None of the Ninth Circuit cases applying the *Brady* rule cites *Restrepo*.

not bar the government from proving facts underlying that charge by the preponderance-of-the-evidence standard that applies at sentencing.

As to the Ninth Circuit's second premise, *i.e.*, that the defendant is being punished for the acquitted conduct, this Court has long recognized that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte*, 115 S. Ct. at 2207. Rather, the court has explained, "the offender is * * * punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment." *Id.* at 2207-2208; see also *Nichols*, 114 S. Ct. at 1927 ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recividist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction"; they "penal[ize] only the last offense committed by the defendant"). Thus, for example, both before and after the enactment of the Guidelines, the Court has held that a court may constitutionally consider the defendant's perjury at trial in sentencing him for the offense of conviction, see *United States* v. *Dunnigan*, 507 U.S. 87 (1993); *United States* v. *Grayson*, *supra*, and has rejected the contention that such a practice amounts to "punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process," *Grayson*, 438 U.S. at 52. Indeed, as this Court recently recognized in *Witte* v. *United States*, *supra*, "by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial," this Court's

cases since *Williams* v. *New York*, *supra*, "necessarily imply that such consideration does not result in 'punishment' for such conduct." *Witte*, 115 S. Ct. at 2206.[7]

3. The Ninth Circuit's error calls for correction by this Court. The *Brady* rule is an unwarranted limitation on the facts a district court may consider at sentencing. Consideration of conduct relating to charges of which a defendant was acquitted does not violate any constitutional or statutory provision or any policy reflected in the Guidelines. Rather, by impeding sentencing courts within the Ninth Circuit from exercising their responsibility to impose punishment that "fit[s] the offender and not merely the crime," *Roberts* v. *United States*, 445 U.S. 552, 556 (1980) (quoting *Williams*, 337 U.S. at 247), the *Brady* rule subverts the Guidelines' fundamental goal of promoting uniform sentencing in the federal courts.

[7] The panel in *Watts* concluded that it was not required to follow this Court's decision in *Witte* because the government did not timely bring *Witte* to the panel's attention. *Witte*, however, was decided by this Court more than three months before the *Watts* panel issued its original opinion. The panel nonetheless decided Watts's claim, and reaffirmed circuit precedent in a manner that binds future panels in other cases, on the basis of "a truncated body of law." *Kamen* v. *Kemper Financial Serv., Inc.*, 500 U.S. 90, 100 n.5 (1991) ("[I]f a court undertakes to sanction a litigant by deciding an effectively raised claim on the basis of a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided"). Moreover, as *Witte* itself made clear, 115 S. Ct. at 2206-2207, that case simply applied principles of law that were recognized by this Court long before the Ninth Circuit adopted the *Brady* rule, and which the Ninth Circuit has simply declined to follow in *Brady* and its progeny. Indeed, the government relied on *Witte* in opposing Putra's claim in the court of appeals, but the *Putra* panel did not address that reliance—notwithstanding Chief Judge Wallace's dissenting view that the "core rationale" of *Brady* cannot be reconciled with *Witte*, see App., *infra*, 33a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

LISA SIMOTAS
Attorney

MAY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10272

D.C. No. CR-93-00086-WBS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VERNON WATTS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
August 14, 1995—San Francisco, California

Filed September 28, 1995

Before: Betty B. Fletcher, Cecil F. Poole,
and Diarmuid F. O'Scannlain, Circuit Judges

Opinion by Judge Fletcher

OPINION

FLETCHER, Circuit Judge:

Vernon Watts appeals his conviction and sentence for possessing with the intent to distribute crack cocaine. We affirm the conviction but vacate Watts's sentence and remand for resentencing.

I. FACTUAL BACKGROUND

The events leading to Watts's arrest and conviction began with the suspicions of Watts's probation officer, John Demmel. Although California's probationers are subject to a condition authorizing warrantless searches of their property, Demmel was well aware that some probationers would lie to their probation officers about where they were living so they could continue to engage in criminal activity without being hindered by probation searches. Demmel had begun to suspect that Watts was one such probationer, telling Demmel that he lived with his mother on Florida Way while he continued his criminal activity undetected at another residence.

When Demmel mentioned his concern to Detective James Cooper of the Sacramento County Sheriff's Department, Cooper told Demmel that he had learned from a confidential informant that Watts was living on the south side of the county with a woman named Sonja Lee and her children, that he drove a Ford Taurus and a minivan, and that he was selling cocaine. His suspicions raised, Demmell asked Cooper to locate Watts's actual residence by following Watts after he left his next probation meeting.

About a week later, when Watts drove away from Demmel's office in a Ford Taurus, Cooper followed.

Although Cooper lost Watts before locating his residence, he did not return to Demmel empty handed: He informed Demmel that Watts was driving a Ford Taurus registered in Watts's name. Demmel found this suspicious because, according to Watts, he was unemployed and had no transportation. Demmel and Cooper discussed the possibility of organizing a larger surveillance team to follow Watts to his residence.

Conveniently, Demmel was one of four probation officers assigned to the Crack Rock Impact Project (CRIP), a federally funded, multi-agency task force devoted to enforcing the laws against crack cocaine. Demmel asked Detective Emanuel Rivera, another member of CRIP, to assist in the surveillance. After a briefing with other members of CRIP, Demmel instructed the participating police officers to conduct a probation search of Watts's residence if they were able to locate it and to stop and search Watts's vehicle if they observed evidence of drug trafficking.

When Watts left Demmel's office in his Ford Taurus after his next scheduled probation interview, Rivera and other CRIP officers followed, staying in contact with Demmel by telephone. The officers hit pay dirt. Watts drove to a house at 8374 Wheatland Way and went inside. Rivera called the electric company and determined that the house's utilities were registered to Sonja Lee. An automobile parked in the driveway also was registered to Lee.

When Watts left the house in his Taurus with a woman and child, Demmel asked the officers to continue their surveillance. Later in the day, Watts dropped the woman and child back at the Wheatland Way address and drove alone to the Florinda Way address where he supposedly lived with his mother.

The officers watched Watts walk to the front door, knock, wait a while, and then leave when no one responded.

Watts then went to a house on Bicentennial Circle for approximately one minute. After he left, Watts drove using what the officers believed to be counter-surveillance techniques, such as driving at variable speeds and making numerous, apparently unnecessary turns. Based on his observations, Rivera believed that Watts had participated in a drug deal at the Bicentennial Circle address. Pursuant to Demmel's request at the CRIP briefing session, Rivera stopped Watts to conduct a probation search of his vehicle. Demmel arrived shortly thereafter. In the search of Watts's car, police discovered a set of keys and a garage door opener. Police later determined that one of the keys and the garage door opener were to the front door and the garage of the Wheatland Way house, respectively.

Demmel directed the officers to conduct a probation search of the Wheatland Way house. When police entered the house with Watts's key, Lee was inside. She told police that she and Watts lived there together. Officers searched the house and found crack cocaine in the kitchen cabinet and two loaded firearms and ammunition in a bedroom closet. After the search, Watts confessed that the guns and drugs were his.

Watts was indicted for possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and for using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Watts moved to suppress the evidence obtained in the search of the house, arguing that the probation search was a subterfuge for a criminal investigation

and that Demmel and police lacked sufficient reason to believe that he lived at Wheatland Way. The district court denied Watts's motion after a hearing.

After a jury trial, Watts was convicted on the narcotics charge and acquitted on the weapons charge. The district court sentenced Watts to 262 months in prison and 60 months of supervised release. He appeals.

II. LAWFULNESS OF THE PROBATION SEARCH

Watts argues that the district court should have suppressed the fruits of the probation search because Demmel was acting as a "stalking horse" for police and because Demmel lacked a reasonable basis for believing that Watts lived at the Wheatland Way address. We disagree, and we affirm Watts's conviction.

A

Because a state's operation of its probation system presents "special needs" beyond normal law enforcement which render impracticable the Fourth Amendment's usual warrant and probable cause requirements, probation searches conducted pursuant to state law satisfy the Fourth Amendment's reasonableness requirement. *Griffin v. Wisconsin*, 483 U.S. 868, 872-80 (1987). However, a probation search may not be used as a subterfuge for a criminal investigation. *See Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). Watts argues that the district court should have suppressed the fruits of the probation search because Demmel was acting as a "stalking horse" for police when he authorized the search. We review

for clear error the district court's factual determination that Demmel was not acting as a stalking horse. *See United States v. Butcher*, 926 F.2d 811, 815 (9th Cir.), *cert. denied*, 500 U.S. 959 (1991); *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir.), *cert. denied*, 474 U.S. 830 (1985).

A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers. *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988); *Smith v. Rhay*, 419 F.2d 160, 162-63 (9th Cir. 1969). However, collaboration between a probation officer and police does not in itself render a probation search unlawful. *See United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (parole officer was not a stalking horse simply because police helped him locate parolee); *Jarrad*, 754 F.2d at 1454 (fact that police investigation preceded parole search does not render the search a subterfuge); *United States v. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976) (finding a lawful probation search even though Narcotics Task Force agents accompanied the probation officer to expedite the search). The appropriate inquiry is whether the probation officer used the probation search to help police evade the Fourth Amendment's usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives. *Harper*, 928 F.2d at 897. A probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer. *Butcher*, 926 F.2d at 815; *Jarrad*, 754 F.2d at 1454.

The district court determined that Demmel, not the police, decided to conduct the probation search. Normally this finding would be sufficient to support the determination that Demmel was not a stalking horse. *See Harper*, 928 F.2d at 897; *Butcher*, 926 F.2d at 815; *Richardson*, 849 F.2d at 441; *Jarrad*, 754 F.2d at 1454. However, Demmel's dual role as both probation officer and member of the concededly "enforcement oriented" CRIP team renders the relevant inquiry more difficult. Watts argues that Demmel was acting more as a police officer than a probation officer.

We share the district court's concern that the participation of a probation officer on a project devoted to law enforcement carries the risk of abusing the probation officer's ability to conduct searches without a warrant and with less than probable cause, a power that is constitutionally permissible only because of the probation system's "'special needs' *beyond normal law enforcement*." *Griffin*, 483 U.S. at 873-74 (emphasis added). We are especially troubled by the district court's express finding that "at least one of the purposes of the CRIP Team is to allow for probation searches in cases where police officers want to search the residence, vehicle or property of a probationer and to avoid the necessity of getting a warrant for the search."

However, the district court's ultimate conclusion that Demmel "was calling the shots" and that he was motivated by the legitimate objectives of the probation system is not clearly erroneous. The district court found that Demmel, as Watts's probation officer and before the participation of any police officers, suspected that Watts did not actually live with his mother on Florinda Way and had returned to the business of selling drugs. His suspicions grew when Cooper—not a member of the CRIP team—told him

that, according to an informant, Watts was selling cocaine again and living with Lee somewhere other than on Florinda Way. Police officers on the CRIP team became involved only at the request of Demmel, who sought their assistance locating Watts's actual residence, a task which proved elusive when attempted by Cooper alone. This would be a different case if police officers had targeted a suspect as part of a normal law enforcement investigation and then enlisted the help of a probation officer in order to search the suspect's home without a warrant supported by probable cause. *See Smith*, 419 F.2d at 162-63 (not a valid parole search when police enlisted parole officer to assist in criminal investigation). Whatever potential for or actual abuse of probation searches which may exist in operating CRIP, the district court did not commit clear error in determining that, in this case, CRIP officers acted as support for a legitimate probation search.

B

We turn next to Watts's argument that the probation search, even if not a subterfuge, nevertheless was unlawful because Demmel lacked the requisite level of suspicion that Watts lived at the Wheatland Way house. The parties agree that a probation search must be supported by some reason to believe that the probationer resides at the premises to be searched. *See Harper*, 928 F.2d at 896; *United States v. Dally*, 606 F.2d 861, 863 (9th Cir. 1979). However, the parties dispute the level of suspicion necessary to support a probation search.

There is some tension among our cases regarding whether a probation search must be supported by probable cause to believe that the probationer resides

on the premises or whether a "reasonable" belief will suffice. In *Harper*, we characterized the requisite level of suspicion as probable cause. Our principal holding in that case was that, under the Supreme Court's decision in *Griffin*, police could search a parolee's home to execute an arrest warrant issued by a parole board. *Harper*, 928 F.2d at 896. We also held that police could conduct such a search only if they had "probable cause" to believe that the arrestee actually lived at the place to be searched. *Id.*

However, before *Harper* we held in *Dally* that a parole search was lawful because the parole officer had a "reasonable basis" and "reasonable belief" that the parolee had moved to the searched residence. *Dally*, 606 F.2d at 863. Moreover, despite our mention in *Harper* of a probable cause requirement, we cited with approval in that case the "reasonable belief" standard employed in *Dally*. *See Harper*, 928 F.2d at 896 (citing *Dally*, 606 F.2d 861). Our decision in *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991), is also relevant. In *Davis*, decided shortly after *Harper*, we held that an item such as a closed container falls within the scope of a probation search as long as there is "reasonable suspicion" to believe that the item is within the ownership, possession, or control of the probationer. *Davis*, 932 F.2d at 758-60. In doing so, we stated broadly that "[t]he permissible bounds of a probation search are governed by a reasonable suspicion standard." *Id.* at 758.

We need not resolve the apparent tension between *Harper*'s probable cause standard and the "reasonableness" standard enunciated in *Dally* and, more recently, *Davis*. We conclude that Demmel and police had probable cause to believe that Watts was living

at the Wheatland Way address. In weekly visits to the Florinda Way house, Demmel had located Watts there only once in fourteen months. On that one occasion, Demmel looked around the house and concluded that what was supposed to be Watts's bedroom lacked the usual signs of residency, such as clothing and personal belongings.

Demmel's suspicions grew when he learned that a confidential reliable informant, who had provided information to Cooper more than a dozen times and whose tips had resulted in multiple convictions, had informed Cooper that Watts was living with Sonja Lee somewhere other than on Florinda Way. Police surveillance verified both the details and the substance of the informant's tip. According to the informant, Watts drove a Ford Taurus; in the first surveillance of Watts, Cooper learned that, contrary to what Watts had told his probation officer, Watts was driving and was the registered owner of a Ford Taurus. In the subsequent surveillance, police observed Watts enter a house whose utilities were verified as registered to Sonja Lee and in whose driveway was a car registered to Sonja Lee. Finally, officers saw Watts go to his mother's home on Florinda Way, knock on the door, then leave when no one responded, strongly suggesting that Watts did not live there. These pieces of information, considered together, were sufficient to give Demmel and the police probable cause to believe that Watts lived at the Wheatland Way address.[1]

[1] Watts argues that his ownership of a key and garage door opener corresponding to the Wheatland Way house cannot be considered in determining whether Demmel and police had adequate reason to believe that he lived there. He argues that the police determined that the key and the garage door opener corresponded to the house only by using them, which was itself an invasion of privacy that must be justified by probable cause. We need not reach this issue because, even without this information, Demmel and police had probable cause to believe that Watts lived at Wheatland Way.

III. SENTENCING ISSUES

Watts appeals his sentence, arguing among other things that the district court erred in determining the quantity of drugs involved in the offense and by enhancing his sentence for possessing a weapon. We uphold the district court's factual finding regarding the quantity of drugs involved in the offense unless it is clearly erroneous. *United States v. Upshaw*, 918 F.2d 789, 791 (9th Cir. 1990), *cert. denied*, 499 U.S. 930 (1992). We review *de novo* the district court's interpretation of the Sentencing Guidelines. *United States v. Blaize*, 959 F.2d 850, 851 (9th Cir.), *cert. denied*, 504 U.S. 978 (1992).

A

Watts argues that the district court erred in determining that his offense involved more than 500 grams of crack. Rivera testified at trial that the crack seized from Watts's home weighed 559 grams when it was seized. A few weeks later, the drugs weighed 550 grams. However, by the time of trial, the drugs' weight had dropped below 500 grams.

The district court did not clearly err in determining that the offense of conviction involved more than 500 grams of crack. The drugs were weighed twice before trial, and each time they weighed significantly more than 500 grams. Although the weight of the drugs fell below 500 grams by the time of trial, expert testimony at trial established that the weight

loss could be due to water loss. The government's chemist testified that the moisture in the crack could evaporate and escape as a vapor through small pores in the plastic bags which stored the crack. In light of Watts's failure to submit evidence contradicting this testimony, the district court's acceptance of the government's theory was not clearly erroneous. *See United States v. Thomas*, 11 F.3d 620, 631 (6th Cir. 1993) (upholding district court's determination that offense involved more than fifty grams of crack because, although the weight of the crack dropped below fifty grams by the time of trial, expert testified that weight loss was attributable to evaporation and the use of small amounts of crack for testing), *cert. denied*, —— U.S. ——, 114 S. Ct. 1570 (1994).

B

The district court enhanced Watts's base offense level by two levels under U.S.S.G. § 2D1.1(b)(1), which applies if "a dangerous weapon (including a firearm) was possessed" during the offense of conviction. Watts argues that *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), precludes this adjustment because the jury acquitted him of violating section 924(c). We agree.

The general rule is that "conduct other than that of which a defendant was convicted may be considered in calculating the offense level . . . if it is part of the same course of conduct as the crime of conviction." *United States v. Piper*, 918 F.2d 839, 840 (9th Cir. 1990). However, a district court sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count. *Brady*, 928 F.2d at 851.

In *Brady*, the defendant had been convicted of voluntary manslaughter and assault with a dangerous weapon, but was acquitted of first degree murder and assault with intent to commit murder. Despite the jury's not guilty verdict, the district court at sentencing departed upward from the applicable guideline range because it determined that the defendant had the "intent to inflict serious injury or to kill the victims." We held that the jury's acquittal on the other, more serious counts was binding at sentencing because "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *Id.* at 851.

We reaffirmed the *Brady* rule in *United States v. Pinkney*, 15 F.3d 825 (9th Cir. 1994). In *Pinkney*, the defendant was convicted of conspiring to commit a robbery, but was acquitted of armed robbery. We held that the jury's not guilty verdict on the armed robbery charge prevented the district court from applying a sentencing enhancement for brandishing a firearm during a robbery. *Id.* at 828-29.

The government argues that the district court could apply a sentencing enhancement under U.S.S.G. § 2D1.1(b)(1) without considering facts "necessarily rejected" by the jury's acquittal on the section 924(c) charge, because the sentencing enhancement contains fewer elements than the section 924(c) statutory offense. Section 924(c) provides a mandatory five-year sentence for any person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." 18 U.S.C. § 924(c). A firearm is used "in relation to" an offense if it facilitated or played a role in the crime. *United States v. Winslow*, 962 F.2d 845, 850 (9th

Cir. 1992). The mere presence of a firearm during a drug trafficking offense is not sufficient to support a violation of section 924(c). *United States v. Phelps*, 877 F.2d 28, 30 (9th Cir. 1989).

The government emphasizes that, in contrast to section 924(c), section 2D1.1(b)(1)'s sentencing enhancement is appropriate if the defendant possessed a weapon during the commission of the offense; the government need not prove that the firearm was used in relation to or facilitated the offense. *See United States v. Restrepo*, 884 F.2d 1294, 1296 (9th Cir. 1989) (possession of a weapon during the offense of conviction is sufficient to support application of an enhancement under U.S.S.G. § 2D1.1(b)(1)). Therefore, the government argues, the district court's determination that Watts possessed a firearm is not a reconsideration of facts rejected by the jury, because the jury could have acquitted Watts on the section 924(c) charge because it believed that Watts possessed a firearm during the offense but that the firearm was not connected to the offense.

Although the government's argument has some surface appeal, it does not withstand closer scrutiny. The connection of a firearm to the offense of conviction, although not an *element* of the weapon enhancement under the Guidelines, is nonetheless relevant. The commentary to U.S.S.G. § 2D1.1(b)(1) provides an exception to the enhancement if the defendant can show that "it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment (n.3); *see also Restrepo*, 884 F.2d at 1296.

Thus, the connection between the firearm and the predicate offense is relevant under both the sentencing enhancement and section 924(c); the only difference between U.S.S.G. § 2D1.1(b)(1) and section 924(c)

is the assignment and standard of the burden of proof regarding this connection.[2] We held in *Brady* that a sentencing judge may not, "under *any* standard of proof," rely on facts of which the defendant was acquitted. *Brady*, 928 F.2d at 851 & n.12 (emphasis added); *accord Pinkney*, 15 F.3d at 829 n.3. The district court's comments at sentencing make clear that it violated *Brady*.

> I find that there is a connection between the possession of the guns and the offense.
>
> . . .
>
> In that regard, although the jury did not find beyond a reasonable doubt that all of the elements, including facilitation of the commission of the offense, were proven, I find by the preponderance of the evidence that the only logical explanation for the guns is that they emboldened Mr. Watts in his possession of the drugs and in his drug dealings.

By applying a two-level enhancement for possession of a weapon under U.S.S.G. § 2D1.1(b)(1), despite the jury's not guilty verdict on the section 924(c) charge, the district court disregarded *Brady*.[3] We

---

[2] The language of section 924(c)(1) requires that a firearm be used "in relation to" a drug trafficking crime, and the exception to the firearm enhancement applies if it is clearly improbable that the firearm was "connected with the offense." However, this circuit has rejected any distinction between the phrases "in connection with" and "in relation to." *United States v. Routon*, 25 F.3d 815, 818 (9th Cir. 1994).

[3] We recognize that several circuits have held that a defendant's acquittal of a section 924(c) charge does not preclude a sentencing enhancement for possession of a firearm under

vacate Watts's sentence and remand for resentencing.[4] *See United States v. Nash*, —— F.3d —— (9th Cir. 1995) (Aug. 24, 1995, Slip op. 10697); *United States v. Still*, 850 F.2d 607, 610 (9th Cir. 1988).

I. CONCLUSION

The search of the Wheatland Way address was a lawful probation search. Police had probable cause to believe that Watts resided at the house, and the distric court's finding that the search was not a subter-

---

U.S.S.G. § 2D1.1(b)(1). *See, e.g., United States v. Billops*, 43 F.3d 281, 288 (7th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 1389 (1995); *United States v. Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991), *cert. denied*, 503 U.S. 992 (1992); *United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991), *cert. denied*, 503 U.S. 972 (1992); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989). However, these circuits are not bound by *Brady*. *See Brady*, 928 F.2d at 850-51 (noting that other circuits permit a sentencing court to make findings of fact that have been implicitly rejected by a jury's acquittal).

[4] Watts raises two additional sentencing issues not properly before us in this appeal. He argues that he was entitled to a three-level reduction for acceptance of responsibility, not just the two-level reduction awarded by the district court. He also argues that there is no scientific or medical basis for distinguishing between crack cocaine and cocaine and, therefore, under the rule of lenity the district court should have sentenced him under the less severe guidelines governing cocaine-related offenses. Because Watts did not raise these issues in the district court, and they are not purely matters of law or subject to any other exception, we do not address them here. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990); *United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987).

fuge for a criminal investigation was not clearly erroneous. We vacate the sentence and remand for resentencing, however, because the application of a two-level upward adjustment for possession of a firearm during the offense violated *Brady* in light of the jury's not guilty verdict on the section 924(c) charge.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10040

D.C. No. CR-92-00784-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHERYL PUTRA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted
February 14, 1995—San Francisco, California

Filed March 5, 1996

Before: J. Clifford Wallace, Chief Judge,
Procter Hug, Jr., and Jerome Farris, Circuit Judges

Opinion by Judge Hug;
Dissent by Chief Judge Wallace

OPINION

HUG, Circuit Judge:

Cheryl Ann Putra was convicted of one count of aiding and abetting in the possession of one ounce of cocaine with intent to distribute. She appealed both her conviction and her sentence. In an unpublished memorandum disposition, we affirmed her conviction along with the convictions of her codefendants. *United States v. Putra*, No. 94-10040 (filed March 5, 1996). This opinion concerns her appeal of her sentence. Putra contends that the district court improperly considered as "relevant conduct" the cocaine involved in a separate count of which the jury acquitted her. We have jurisdiction under 8 U.S.C. § 1291, and we remand for resentencing.

I.

Count 18 of Putra's indictment charged her with aiding and abetting in the possession with intent to distribute one ounce of cocaine on May 8, 1992. Count 19 charged her with aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992. In addition, she was charged in Count 2 with conspiring knowingly and intentionally to distribute a quantity of cocaine in excess of 500 grams. Following trial, the jury returned a guilty verdict on Count 18, but it acquitted her on Count 19 and Count 2. However, at sentencing, the district court determined that the preponderance of the evidence showed that Putra was involved in both of the charged aiding and abetting transactions. The court aggregated the amount of cocaine involved in Counts 18 and 19 to determine her offense level, despite the

jury acquittal on Count 19. Without the added cocaine from Count 19, Putra's guideline range would have been 15-21 months; with the added cocaine included, her range was 27-33 months. The court sentenced her to 27 months.

II.

The issue on appeal is whether a judge can sentence a defendant for a crime of which the jury found her not guilty. We review a district court's interpretation of the Sentencing Guidelines *de novo*. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994). We conclude that the court erred by failing to apply our prior decision in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991).

The court instructed the jury generally on aiding and abetting that:

> The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.
>
> So, if another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts or conduct of such other persons just as though the defendant

> had committed the acts or engaged in such conduct.
>
> Notice, however, that before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some manner with the crime and participate in it with the intent to bring about the crime.
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.
>
> In other words, you may not find a defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

The court went on to instruct the jury on the individual offenses. Regarding the counts against Putra, the instructions read in part: "The defendants are charged in Counts . . . 18 [and] 19 . . . with possession with intent to distribute cocaine." The court then set forth the elements of possession.

The jury acquitted Putra of aiding and abetting in the possession with intent to distribute the five ounces of cocaine involved in Count 19. By acquitting her of this charge, the jury necessarily found that she was not involved in the possession of that cocaine. Putra challenges the court's inclusion of the additional

cocaine as improper under the Sentencing Guidelines as interpreted by our decision in *Brady*.

United States Sentencing Guidelines ("U.S.S.G.") § 1B1.3(a)(2) provides that the defendant's base offense level shall be determined, with respect to offenses of a character for which U.S.S.G. § 3D1.2(d) would require grouping, on the basis of all acts and omissions described in subdivision (1)(A) and (1)(B) that were part of the same course of conduct or common scheme or plan as the offense of conviction. Subdivision (1)(A) includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). Application note 3 further states that under subsection (a)(2), the proper course is to include the total quantity of narcotics involved regardless of the fact that the defendant has not been convicted of the multiple counts. As an example, the application note provides that where a defendant is engaged in multiple drug sales, as part of the same course of conduct or common scheme or plan, then the total quantity of drugs involved is to be used to determine the offense level, even if the defendant is convicted of a single count charging only one of the sales. U.S.S.G. § 1B1.3, comment. (n.3).

Although U.S.S.G. § 1B1.3, as interpreted by application note 3, indicates it is proper to include the total quantity of drugs involved in the same course of conduct scheme or plan even if the defendant is convicted of only one count, it does not deal with the situation where the defendant was charged with the other count involved and is acquitted. We considered this situation in an analogous context in *United*

States v. Brady, 928 F.2d 844 (9th Cir. 1991). In *Brady*, the jury acquitted the defendant of first degree murder and assault with intent to commit murder, but it convicted him of the lesser included offense of voluntary manslaughter. At sentencing, the court reconsidered the defendant's "state of mind" and departed upward on that basis and on the degree of planning and preparation involved in the offense. *Id.* at 850. We reversed, concluding that the Guidelines do not allow "a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict." *Id.* at 851. "Otherwise, any time a judge disagreed with the jury's verdict, the judge could 'reconsider' critical elements of the offense to avoid the restrictions of the Guidelines and push the sentence to the maximum—in effect punishing the defendant for an offense for which he or she had been acquitted." *Id.* at 851-52.

Likewise, this case presents a situation where allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted. The jury's finding that Putra did not aid or abet in the possession of the five ounces of cocaine on May 9, 1992, is an explicit rejection of her involvement in that transaction. The sentencing court cannot, after the jury's determination on those facts, consider the facts again and conclude that Putra was indeed involved. Although the standard of proof differs for an acquittal and for sentencing, we have specifically rejected this argument as justification for considering facts underlying the jury's acquittal. In *Brady*, we held that a district court may not rely upon facts that have been rejected by a jury's not guilty verdict. *Id.* at 851 & n.12. In this case, the

district court's sentence can only be reached if the district court is allowed to disregard the jury verdict on Count 19 and substitute its own factual finding. This is clearly forbidden under *Brady*.

We note, however, that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines. Thus, our application of *Brady* to the circumstances of this case is very narrow. We acknowledge that *Brady* is itself limited by *United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995), and *United States v. Diaz-Rosas*, 13 F.3d 1305 (9th Cir.), *cert. denied*, 114 S. Ct. 1848 (1994), cases in which the defendants were convicted of the conspiracy count, but acquitted of certain possession counts. Under such circumstances, the district court may hold a defendant accountable for drugs possessed or distributed by co-conspirators, so long as it was in furtherance to jointly undertaken criminal activity and reasonably foreseeable to the defendant. *See* U.S.S.G. § 1B1.3, comment. (n.2). However, these cases are not applicable to the facts at hand because Putra was acquitted of the conspiracy charge and of any activity related to the cocaine involved in Count 19. In such a situation, the district court should not consider the narcotics in possession of her codefendants when setting Putra's sentence.

The Government contends that this case nonetheless fits squarely within section 1B1.3 application note 3, and that because *Brady* did not involve this section, we are not constrained by its holding. We do not agree. The jury's verdict on Count 19 under the court's instructions precludes an application of section 1B1.3 to this case because the jury's verdict

rejected Putra's participation in the Count 19 transaction in all respects. U.S.S.G. § 1B1.3 requires a finding that Putra was in some way involved in the May 9 transaction to include the offense as "relevant conduct." The jury's acquittal is a finding that Putra was not involved, did not commit, did not aid or abet, and was not engaged in the May 9, 1992 transaction.

This result is not inconsistent with application note 3 to U.S.S.G. § 1B1.3. The note states that the defendant need not be convicted of multiple offenses to be sentenced based on the aggregate amount of narcotics involved. This guidance, however, is directed to uncharged conduct where a preponderance of the evidence demonstrates the defendant's involvement; it does not address acquitted conduct. To allow the court to increase Putra's sentence based on acquitted conduct would make the jury's findings of fact pointless and contradict our holding in *Brady*. Thus, the district court erred by including the five ounces of cocaine in Count 19 to increase Putra's sentencing range.

REVERSED and REMANDED for resentencing.

WALLACE, Chief Judge, dissenting:

The majority starts toward the wrong answer by asking the wrong question: "whether a judge can sentence a defendant for a crime of which the jury found her not guilty." Opinion at 3052. Putra was not sentenced or punished for the May 9, 1992, crime. Rather, the district court sentenced her for the crime of which she was convicted, aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992. The issue before us is whether Putra's sentence for this crime may be increased because of her involvement in the May 9 transaction. In other words, the issue is whether Putra is accountable under section 1B1.3 of the 1991 United States Sentencing Guidelines for the five ounces of cocaine her codefendants possessed with intent to distribute on May 9. Because I believe the district court properly considered this amount in determining Putra's base offense level, I respectfully dissent.

Merely because a jury acquitted Putra on charges related to the May 9 drug transaction does not preclude the district court from including the amount of cocaine involved in that transaction in determining her base offense level. The majority, however, concludes that section 1B1.3 "does not deal with the situation where the defendant was charged with [an]other count involved and is acquitted [on that count]." *Id.* at 3054. The majority further states that section 1B1.3 "does not address acquitted conduct." *Id.* at 3056. Such sweeping language contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority.

Section 1B1.3 allows a sentencing court to consider all "relevant conduct" in determining an appropriate sentencing range. Where the defendant has been charged with multiple counts grouped together pursuant to section 3D1.2(d), such as here, relevant conduct includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

The Application and Background Notes accompanying section 1B1.3 illustrate that the Guidelines allow sentencing courts to consider circumstances surrounding criminal activity for which a defendant was acquitted. Application Note 3 makes it clear that section 1B1.3 does not require Putra "to have been convicted of multiple counts." *Id.* at comment, n.3. The Note provides the following example:

> [W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.

Id. Although the Note does not explicitly state that the hypothetical defendant was charged with and acquitted of the two other sales, it is reasonable to infer that the court dismissed or the jury acquitted the defendant on those counts. Thus, the Note reasonably can be interpreted to mean that a defendant need not be convicted of criminal activity for a court to consider that activity in determining sentencing ranges. *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992) (*Boney*).

More to the point is the Background Note to section 1B1.3, which explains that in determining what constitutes relevant conduct under subsection (a)(2), courts should consider "pattern[s] of misconduct" rather than convictions on specific counts because "the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing." *Id.* Thus, "[r]elying on the entire range of conduct, *regardless of the number of counts that are alleged or on which a conviction is obtained*, appears to be the most reasonable approach to writing workable guidelines for [offenses falling under § 3D1.2(d)]." *Id.* (emphasis added).

The range of conduct amounting to "acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" under subsection (a)(2) includes acts "committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable." *Id.* at n.2. Application Note 2 states that a defendant is "otherwise accountable" for the "conduct of others . . . in furtherance, and reasonably foreseeable in connection with, [jointly undertaken] criminal activity." *Id.* at comment., n.2.

The district court found that the government succeeded in showing, by a preponderance of the evidence, that Putra "was involve[d] in activity where it was reasonably foreseeable that additional [drug] activity would continue." *See Witte v. United States*, 115 S. Ct. 2199, 2207 (1995) (*Witte*) (State need not prove facts related to the severity of punishment beyond a reasonable doubt), *citing McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986); *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994) (*Nichols*)

(State must prove conduct considered in sentencing by a preponderance of the evidence); *United States v. Restrepo*, 946 F.2d 654, 656 (9th Cir. 1991) (en banc) (Sentencing Guidelines did not alter standard of proof required of facts related to sentencing), *cert. denied*, 503 U.S. 961 (1992). The district court thus adopted paragraph 19 of the Presentence Report, which states:

> The defendant's presence during [the May 9] transaction constitutes relevant conduct pursuant to U.S.S.G. § 1B1.3(a)(2) in that codefendant Vassilios Liaskos' conduct was a reasonably foreseeable act in furtherance of a jointly undertaken criminal activity, as well as part of the same course of conduct or common scheme or plan as the offense of conviction.

This finding is not clearly erroneous. *See United States v. Karterman*, 60 F.3d 576, 580 (9th Cir. 1995) (*Karterman*) ("The factual findings on which the lower court based [a sentencing] enhancement are reviewed for clear error."); *see also United States v. Shabani*, 48 F.3d 401, 404 (9th Cir. 1995) (reviewing court should give "due deference to the district court's application of the guidelines to the facts"). The district court based its finding on (1) Putra's admission that she was in Vassilios Liaskos's car when he sold cocaine to Alexander Panos on May 9; (2) Panos's testimony that he met Putra on several occasions to purchase cocaine, including May 9; (3) testimony from Liaskos, who stated that on May 9 Putra met him only to have lunch, although he and Putra never in fact went to lunch on that day; (4) testimony from Richard Haller and Robert Blackmon, who said that Liaskos was grooming

Putra to take over his drug business; and (5) evidence complied by a surveillance team, which photographed and watched both the May 8 and May 9 transactions. These facts provide ample evidence that Putra could reasonably foresee that Liaskos would sell cocaine to Panos on May 9 in furtherance of a jointly undertaken criminal activity, and that Putra's involvement in the May 9 transaction was part of the same course of conduct or common scheme or plan as her offense of conviction. Because the district court did not clearly err in finding that Putra was accountable for the amount of drugs sold on May 9, it had authority under section 1B1.3 to include the five ounces of cocaine sold on May 9 in determining her base offense level and corresponding sentencing range.

This result is consistent with section 1B1.3 and this court's practice prior to the enactment of the Sentencing Guidelines, when a sentencing judge could consider a wide range of evidence, "in order to tailor the punishment to the criminal rather than to the crime." *United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979) (*Morgan*); *see also Nichols*, 114 S. Ct. at 1928 (describing broad discretion traditionally exercised by sentencing courts). There is no evidence that Congress intended the Sentencing Guidelines to alter this practice.

The purpose of the Sentencing Reform Act of 1984 (Act), 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-98, "was to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns v. United States*, 501 U.S. 129, 133 (1991) (*Burns*), *quoting* S. Rep. No. 98-225 at 49 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 363-68 (1989) (recounting the

Act's background and impact on traditional sentencing practices). While the Act "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns*, 501 U.S. at 132, the revolution was one of determinancy and procedural reform only. *Id.* at 133. Such procedural reforms injected more formality into the sentencing process, but they did not remove the discretion exercised by sentencing judges prior to the enactment of the Guidelines. *Id.* at 133; *see also* U.S.S.G. § 6A1.3, comment. (explaining that where there is a dispute over what constitutes a permissible factor, the Guidelines merely require the court to "ensure that the parties have an adequate opportunity to present relevant information," including "notify[ing] the parties of [the court's] tentative findings and afford[ing] an opportunity for correction of oversight or error before sentence is imposed"); *cf. Witte*, 115 S. Ct. at 2207 (Sentencing Guidelines did not alter sentencing court's discretion to consider uncharged relevant conduct). The Guidelines' relevant conduct provision merely channeled future discretion by recognizing that an offense is more serious when it represents part of a pattern of criminal conduct. As the decisions of other circuits have recognized, relevant conduct "corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989); *see also United States v. Mack*, 938 F.2d 678, 681 (6th Cir. 1991) (section 1B1.3 "memoralizes a long standing practice of trial judges"). Pre-Guidelines practice in this court allowed judges to consider acquitted conduct in sentencing. *Morgan*, 595 F.2d at

1136; *United States v. Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

This should have ended the matter for us and resulted in a unanimous affirmance of the sentence. However, *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991) (*Brady*), changed this practice, without citing any authority, and used a rationale that the Supreme Court now has discredited. Should *Brady* change our analysis?

Brady held that a sentencing court may not consider facts that the jury necessarily rejected by a judgment of acquittal. *Id.* at 851. The district court had upwardly departed from the Guidelines in sentencing Brady for voluntary manslaughter based on his "state of mind, and the degree of planning and preparation of [the] offenses." *Id.* at 850. Brady argued that the district court "effectively overrule[d]" the jury's verdict, which convicted him of only voluntary manslaughter, not first degree murder, thereby necessarily rejecting the fact that he had the mental state to intend murder. *Id.* Accepting this reasoning, *Brady* ruled that the district court "in effect punish[ed] the defendant for an offense for which he or she had been acquitted." *Id.* at 852. *Brady* further stated that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *Id.* at 851. *Brady* explicitly rejected the reasoning adopted by most other courts of appeals—that a sentencing court may consider as relevant conduct acquitted conduct that the government proved by a preponderance of the evidence. *Id.* at 851 n.12; *see Boney*, 977 F.2d at 635-36; *United States v. Macciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Isom*, 886 F.2d

736, 738-39 (4th Cir. 1989); *United States v. Juarez-Oretga*, 866 F.2d 747, 748-49 (5th Cir. 1989); *United States v. Masters*, 978 F.2d 281, 285-87 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2333 (1993); *United States v. Olderbak*, 961 F.2d 756, 764-65 (8th Cir.), *cert. denied*, 113 S. Ct. 422 (1992); *United States v. Rivera-Lopez*, 928 F.2d 372, 373 (11th Cir. 1991).

Nevertheless, we have reaffirmed *Brady* several times, most recently in *United States v. Watts*, 67 F.3d 790, 796 (9th Cir. 1995). *See also Karterman*, 60 F.3d at 581; *United States v. Pinkney*, 15 F.3d 825, 829 (9th Cir. 1994) (*Pinkney*); *United States v. Diaz-Rosa*, 13 F.3d 1305, 1307-08 (9th Cir.), *cert. denied*, 114 S. Ct. 1848 (1994). These decisions recognize that the "core rationale" of *Brady*—that we would "pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted"—is "applicable to the use of 'facts that have been rejected by a jury's not guilty verdict' as a basis for enhancing a defendant's sentence." *Pinkney*, 15 F.3d at 829, *quoting Brady*, 928 F.2d at 851.

But can we still adhere to *Brady*, or has it been undermined by subsequent Supreme Court authority? The Court recently rejected *Brady*'s reasoning in *Witte*. Although *Witte* addressed whether section 1B1.3 includes as "relevant conduct" activity for which a defendant already has been punished for purposes of double jeopardy, its reasoning is equally applicable to the issue at hand—whether section 1B1.3 may include activity for which a defendant has been acquitted. *Witte* first recognized that relevant conduct under section 1B1.3 includes all conduct "in which the defendant was engaged and not just with

regard to the conduct underlying the offense of conviction." *Witte*, 115 S. Ct. at 2203. The Court then reaffirmed that sentencing courts traditionally had discretion to consider a defendant's past criminal behavior, "even if no conviction resulted from that behavior." *Id.* at 2205, *quoting Nichols*, 114 S. Ct. at 1928. Finally, the Court stated that "consideration of information about the defendant's character and conduct at sentencing *does not result in 'punishment' for any offense other than the one of which the defendant was convicted.*" *Witte*, 115 S. Ct. at 2207 (emphasis added). The Court continued:

> To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the "character of the offense," the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute). But, while relevant conduct thus may relate to the severity of the particular crime, the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment.
>
> . . . .
>
> The relevant conduct provisions of the Sentencing Guidelines . . . are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal

> activity. . . . We hold that, where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction.

Id. at 2207-08 (emphasis in original).

The district court's sentence punishes Putra only for aiding and abetting possession with intent to distribute one ounce of cocaine. The court stated that it considered evidence concerning the May 9 transaction "to show other related acts, other similar acts which doesn't punish the person for those acts but just shows that [Putra] should be punished more for the act for which the jury did find her guilty." The district court's finding that her involvement in the May 9 transaction constitutes "relevant conduct" is supported by a preponderance of the evidence, and cannot be held to be clearly erroneous. Furthermore, its imposition of a 27-month sentence falls well within the statutory limit of 20 years. *See* 21 U.S.C. § 841(b)(1)(C). Thus, the district court properly determined Putra's offense level by aggregating the cocaine involved in the May 8 and May 9 transactions. Because the sentence is fully consistent with *Witte*, I would affirm the district court. *Brady* must not be considered as continuing circuit authority in light of *Witte*.

But even if *Brady* still controlled following *Witte*, the district court's sentence should be upheld under *Karterman*, which held *Brady*'s holding was narrow. Karterman was convicted of filing false tax returns and acquitted of conspiring to distribute cocaine and distribution of cocaine. The district court nevertheless adjusted his base offense level upward two levels

for failing to report income exceeding $10,000 that came from criminal activity. *Karterman*, 60 F.3d at 578. Karterman argued that, because the jury necessarily found that he did not distribute or conspire to distribute cocaine, *Brady* barred the upward adjustment. We rejected this argument because "we [could not] tell what facts or evidence the jury rejected when it acquitted Karterman on [the drug conspiracy and distribution counts]." *Id.* at 581. Because "the jury might have accepted all the evidence of Karterman's drug distribution activity but acquitted him of conspiracy because it rejected the evidence that Karterman had an agreement with another . . . the jury did not *necessarily* reject Karterman's involvement in the substantive conduct underlying the conspiracy charge—*i.e.*, drug trafficking." *Id.* (emphasis in original). Thus, we held that the district court could "consider[], for sentencing purposes, [] conduct that was not charged *or was not proven at trial.*" *Id.* at 582 (emphasis added). "[A] narrow interpretation [of *Brady*] is most consistent with the policy goals of the Guidelines," which "generally permit a sentencing judge to consider evidence of conduct that was not proven beyond a reasonable doubt at trial." *Id.* at 581.

This case is similar to *Karterman* in that we cannot tell what facts the jury necessarily rejected in acquitting Putra of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9. The majority is plainly wrong in stating that "[t]he jury's acquittal is a finding that Putra was not involved, did not commit, did not aid or abet, and was not engaged in the May 9, 1992 transaction. Opinion at 3056. Let me explain why.

First, it is undisputably true that an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences, including the majority.

In addition, to hold Putra accountable under section 1B1.3, the district court need only find, by a preponderance of the evidence, that she committed acts that were part of the same course of conduct or common scheme or plan as the offense of conviction. Such acts may include "conduct of others in furtherance of the execution of [a] jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." U.S.S.G. § 1B1.3, comment., n.1. There is ample evidence that allowed the district court to find that Putra either committed acts that were part of the same course of conduct or common scheme or plan as the possession with intent to distribute cocaine on May 8; or engaged in jointly undertaken criminal activity that made the May 9 transaction reasonably foreseeable to her. For example, Putra's presence at the May 9 transaction supported Haller and Blackmon's testimony that Liaskos was grooming Putra to take over his operation, thereby providing evidence that Putra reasonably could foresee the May 9 transaction.

This is not necessarily inconsistent with the jury's acquittal of Putra for aiding and abetting in the possession with intent to distribute cocaine on May 9 or for conspiring to distribute a quantity of cocaine in excess of 500 grams. The jury could have acquitted Putra on the aiding and abetting charge because it

found that the government failed to prove she did not intend to commit a crime on May 9. *See* opinion at 3052-53 (restating jury instructions on aiding and abetting charge). Further, the jury could have acquitted her of the conspiracy count because it found that she conspired to distribute less than 500 grams of cocaine. Neither of these possible determinations preclude the district court from finding that Putra was sufficiently involved in the May 9 transaction to consider the five ounces of cocaine sold on that day in determining her base offense level. *See Karterman*, 60 F.3d at 581 (necessarily rejected facts under *Brady* do not include "facts that were 'possibly rejected' or even 'probably rejected'"). Thus, even if *Brady* is still good law, we should affirm the district court's sentence.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10272

D.C. No. CR-S-93-00086-WBS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VERNON WATTS, DEFENDANT-APPELLANT

Filed January 24, 1996

Denial of Rehearing Filed April 2, 1996

Before: Betty B. Fletcher, Cecil F. Poole, and Diarmuid F. O'Scannlain, Circuit Judges

---

ORDER DENYING REHEARING

The government's petition for rehearing is denied. It argues for the first time that *Witte v. United States*, —— U.S. ——, 115 S. Ct. 2199 (1995), overrules *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991). That argument is not properly before us. The government, after requesting and being granted

an extension of time to file a petition for rehearing, elected not to do so within the extended time. It later requested that we hold the mandate so that it might brief to the court the effect of *Bailey v. United States*, —— U.S. ——, 116 S. Ct. 501 (Dec. 6, 1995). We stayed the mandate to allow the briefing of *Bailey*. We limit our consideration of the government's arguments to those directed to *Bailey*. We find them unpersuasive. The question here is not whether the jury was wrongly instructed in light of the teachings of *Bailey*. All agree it was wrongly instructed. Watts was acquitted of the 18 U.S.C. § 924(c) offense even under the pre-*Bailey* standard that required only that the firearm was within the possession or control of the defendant and available to him thus emboldening him to commit the underlying offense. Since Watts cannot be retried, the standard under which he was acquitted is cast in concrete for this case. The rationale that precludes sentence enhancement based on the acquitted conduct is not eroded by *Bailey*. *Bailey* does not affect the outcome of this case.

APPENDIX D

[Filed Mar. 5, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-10040
94-10088
94-10135
94-10136

DC No. CR-92-00784-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHERYL PUTRA, DIMITRI KONTOPIDES,
DIMITRIOS LIASKOS,* VASSILIOS LIASKOS,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted February 14, 1995
San Francisco, California

---

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

MEMORANDUM **

Before: WALLACE, Chief Judge, HUG, and FARRIS, Circuit Judges.

Four codefendants convicted of various criminal violations resulting from their involvement in a lucrative narcotics operation in Hawaii appeal their convictions and sentences. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the convictions and sentences, with the exception of Putra's sentence, which we deal with in a separate opinion remanding for resentencing.

I.

Defendant Cheryl Ann Putra contends that insufficient evidence existed to support her conviction for aiding and abetting by knowingly and intentionally possessing with intent to distribute approximately one ounce of cocaine on May 8, 1992. We review the sufficiency of the evidence to determine " 'whether any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. The test is whether the evidence and all reasonable inferences which may be drawn from it, when viewed in the light most favorable to the Government, sustain the verdict.' " *United States v. Terry*, 911 F.2d 272, 278 (9th Cir. 1990) (citation omitted).

We conclude that sufficient evidence existed to support Putra's conviction. Putra does not dispute that she was present during the narcotics transaction; rather, she contends that the Government failed to establish her involvement. However, a government

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

witness involved in the "controlled buy" testified to Putra's involvement. He testified that a woman named "Maria", whom he later identified in court as Putra, responded to his call and handled the money exchanged. The transaction was photographed by surveillance officers. Additionally, the government witnesses testified that Putra had delivered cocaine to him on several other occasions in her car. Furthermore, the car used during the narcotics exchange was rented under Putra's driver's license the day before, and Putra was listed as the spouse of Vassilios Liaskos on the rental agreement. Finally, testimony established that Vassilios Liaskos was grooming Putra to take over his narcotics business while he went to Greece for the summer. A summary of Liaskos' cellular phone records indicate 26 calls made to Putra between March 23 and May 12, 1992. Taken together, this evidence is sufficient to enable a jury to conclude beyond a reasonable doubt that Putra aided and abetted the May 8 narcotics transaction.

II.

Putra's second contention is that the district court erred in denying her motion for judgment of aquittal based on inconsistent verdicts. We review *de novo* the legal determination whether a defendant may upset a verdict because it is inconsistent with an acquittal. *United States v. Hart*, 963 F.2d 1278, 1280 (9th Cir. 1992).

The rule is well established that an inconsistent verdict is an insufficient ground on which to set aside a verdict. *See United States v. Powell*, 469 U.S. 57, 64-65 (1984); *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 977-78 (9th Cir.), *cert. denied*,

115 S. Ct. 482 (1994). At any rate, we conclude that the verdicts are not inconsistent. While the jury found sufficient evidence to convict Putra of aiding and abetting Vassilios Liskos on May 8, there are reasons why it may have acquitted her of the conspiracy charge. In addition to the aiding and abetting charge, Putra was charged with participating in a conspiracy beginning in January 1987 until her arrest in May 1992. Quite reasonably, the jury could have found sufficient evidence to convict her of aiding and abetting the May 8 transaction, but not have found sufficient evidence of her involvement in the entire conspiracy. The district court did not err in denying her motion for judgment of acquittal.

III.

Putra's third contention is that the district erred by allowing evidence into trial of Putra's narcotic transactions with Vassilios Liaskos between 1987 and 1992. We review the admission of prior bad acts evidence under Fed. R. Evid. 404(b) for abuse of discretion. *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993). We conclude that the court did not abuse its discretion.

Putra specifically objected to the admission of the testimony of Robert Blackmon and Richard Haller. However, this evidence was relevant and probative. Not only did the evidence go directly to Putra's participation in the conspiracy in which she was charged with participating, the evidence was also necessary to document the roles of the various other conspirators. Furthermore, Putra fails to establish that she was prejudiced by the admission of the evidence. *See United States v. Simas*, 937 F.2d 459, 464 (9th Cir. 1991) (defendant must indicate how evidence resulted in unfair prejudice).

IV.

Putra's fourth contention is that her conviction should be reversed because she was not arraigned in person on the fifth superseding indictment, the indictment which included the charge on which she was convicted. This argument is meritless.

We held in *United States v. Romero*, 640 F.2d 1014, 1015 (9th Cir. 1981), that a defendant must establish prejudice from a failure to follow Fed. R. Crim. P. 10 in order to be entitled to relief. Putra has not met this burden. "What is necessary is that the defendant know what [s]he is accused of and be able to adequately defend [her]self." *Id.* Her counsel indicated that he was prepared to proceed on the count and that he had "conferred extensively" with Putra prior to the trial. Furthermore, Putra failed to ask the court to arraign her in person prior to the jury's empanelment. *See* Fed. R. Crim. P. 10 advisory note 3 (failure to comply with rule is a mere technical irregularity not warranting reversal if not raised before trial).[1]

V.

Defendant Dimitri Kontopides contends that the district court erred by allowing a government witness to testify on redirect examination about Kontopides' prior state arrest and by allowing the Government to introduce evidence of his three prior felony convictions without first balancing the probative value of the evidence against its prejudicial effect. We review the admission of prior bad acts evidence

[1] We deal with Putra's fifth contention concerning her sentence in a separate published opinion.

for abuse of discretion. *Khan*, 993 F.2d at 1376. Neither argument has merit.

First, Kontopides "opened the door" to the government agent's testimony on redirect examination by raising the testimony himself on cross-examination. *See United States v. Hegwood*, 977 F.2d 492, 496 (9th Cir. 1992) (if defendant "opens the door," he cannot later complain about subsequent government inquiry into the issue), *cert. denied*, 113 S. Ct. 2348 (1993). Kontopides introduced the evidence himself by asking the agent whether he had been present at this prior arrest. He cannot complain thereafter when the Government inquired of the agent whether the arrest was a federal or a state arrest. The court did not err by allowing that testimony.

Kontopides similarly waived his right to allege unfair prejudice on the court's admission of his three prior felony convictions. *See United States v. Williams*, 939 F.2d 721, 725 (9th Cir. 1991) ("By bringing out the fact of the prior conviction during [] direct examination of [defendant], [defendant's] attorney deprived the court and the government of a last chance to reverse their pre-stated positions."). Kontopides' counsel introduced the three prior convictions on direct examination. Furthermore, the court did not allow the Government to question Kontopides on his fourth conviction, concluding that the additional conviction did not add any probative value. The court did not abuse its discretion in allowing the Government to question Kontopides on his prior convictions.

VI.

Defendant Dimitrios Liaskos contends that the district court erred in denying the defendants' motion for a mistrial by concluding that the Government did

not have a duty to disclose a debriefing report prepared by a detective which summarized Sergio Pangiotopoulos' post-arrest statements. We review a denial of a mistrial for abuse of discretion, *United States v. Chan Yu-Chong*, 920 F.2d 594, 599 (9th Cir. 1990), and a *Brady v. Maryland* violation *de novo*. *United States v. Lehman*, 792 F.2d 899, 901 (9th Cir.), *cert. denied*, 479 U.S. 868 (1986). The court did not abuse it [*sic*] discretion.

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Impeachment evidence, as well as exculpatory evidence, is favorable evidence. *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). However, reversal is only required if the evidence is material. *Id.* "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Dimitrios Liaskos has not established that the evidence was material because he has not established a reasonable probability that the result of his proceeding would have been different had the report been disclosed to him earlier. His proffered use of the report is insufficient to undermine the confidence in the outcome of his case. Pangiotopoulos did not provide any evidence against Dimitrios. The court did not err in concluding that no *Brady* violation was established.

VII.

Dimitrios Liaskos also contends that the district court erred by allowing Pangiotopoulos to testify at his sentencing hearing, thereby allowing into evidence an additional five kilograms of cocaine that Pangiotopoulos allegedly delivered to Dimitrios in 1989 and 1990. We review the district court's decision to allow testimony at a sentencing hearing for abuse of discretion. *See United States v. Upshaw*, 918 F.2d 789, 791 (9th Cir. 1990), *cert. denied*, 499 U.S. 930 (1991).

Dimitrios was given an opportunity to cross-examine Pangiotopoulos at the hearing, and he had ample notice that the court would consider evidence regarding Pangiotopoulos' delivery of cocaine to him. Further, Pangiotopoulos testified consistently at the sentencing hearing with the statements in the presentence report. After the hearing, the district court determined by the preponderance of the evidence that Pangiotopoulos delivered a total of five kilograms of cocaine to Dimitrios. *See United States v. Restrepo*, 946 F.2d 654, 658-59 (9th Cir. 1991), *cert. denied*, 503 U.S. 961 (1992). The district court did not abuse its discretion in allowing this testimony.

VIII.

Defendant Vassilios Liaskos contends that the district court abused its discretion by denying his motion to dismiss his indictment, or in the alternative to exclude the testimony of George Mihailidis, on the grounds that his Fifth Amendment due process right and Sixth Amendment right to counsel were violated. The court did not abuse its discretion.

Although attorney Tashima's representation of Mihailidis after his earlier representation of Liaskos presented a potential conflict and was improper, Liaskos must establish prejudice. He has not established that he was prejudiced by either the Government's intrusion into his attorney/client relationship or by Tashima's early, brief representation of him and his later representation of Mihailidis. The district court found that Mihailidis did not provide Tashima with the source of the cocaine or its intended recipient during Tashima's initial representation of Mihailidis. In fact, Mihailidis did not mention Vassilios Liaskos to Tashima until the debriefing session in August 1992. The court further found that Tashima did not discuss any of his conversations with Liaskos with Mihailidis, Agent Alapa, AUSA Muehleck, or with any government agent or employee. Finally, the court found that nothing Tashima learned during his 1.2 hours of representation of Liaskos was used by the Government to develop evidence or further investigate Liaskos. Liaskos does not establish that these findings are clearly erroneous. As such, we conclude that Liaskos is unable to establish that he was in any way prejudiced. *See United States v. Irwin*, 612 F.2d 1182, 1185-87 (9th Cir. 1980) (mere intrusion into relationship is not enough to violate the Sixth Amendment; the intrusion must substantially prejudice the defendant).

IX.

Vassilios Liaskos next contends that the district court erred by failing to determine on the record that he had a reasonable opportunity to review his presentence report with his counsel prior to sentencing. We review *de novo* whether the legal requirements

of Fed. R. Crim. P. 32 were satisfied. *United States v. Maree*, 934 F.2d 196, 199 (9th Cir. 1991). This claim is meritless.

We have held that Rule 32 only requires that the sentencing court "reasonably relies on evidence indicating that a defendant has read the presentence report and discussed it with counsel." *United States v. Lewis*, 880 F.2d 243, 245-46 (9th Cir. 1989). It is also necessary that the defendant establish prejudice and that he make an affirmative allegation that he failed to read the report. *See United States v. Davila-Escovedo*, 36 F.3d 840, 844 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 953 (1995). Because Liaskos has done neither, we hold that the error, if any, was harmless.

X.

Vassilios Liaskos next contends that the district court erred in imposing a $500,000 fine on him because the record does not establish that he had the ability to pay it. We review the district court's finding that he had the ability to pay for clear error. *United States v. Favorito*, 5 F.3d 1338, [*sic*] (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994).

We have reviewed the record, and we conclude that it supports a finding that Vassilios did not establish an inability to pay. The Government put forth much evidence of the lucrative dealings of Vassilios and his family members. He bought expensive real estate and cars with cash, he transferred money out of the country to relatives, and he had the ability to transfer money back into the United States. Furthermore, Vassilios failed to provide the probation office with his financial information prior to his sentencing. Without doing so, Vassilios cannot carry his burden of establishing an inability to pay. *See United States*

v. Soyland, 3 F.3d 1312, 1315 (9th Cir. 1993). As such, we conclude that the district court did not clearly err.

XI.

Vassilios Liaskos' final contention is that the district court erred in declining to depart downward on his sentence. It is well established that a district court's discretionary refusal to depart downward from the Sentencing Guidelines is not reviewable on appeal. *See United States v. Eaton*, 31 F.3d 789, 792-93 (9th Cir. 1994). Although Vassilios contends that the court mistakenly believed that it could not depart, the record establishes otherwise. Because we conclude that the record does not establish such a mistaken belief, we will not review the district court's discretionary refusal to depart downward on appeal.

AFFIRMED, except as to the sentence for Putra.

APPENDIX E

Section 3661 of Title 18 of the United States Code provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Section 1B1.3 of the Sentencing Guidelines provides:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be

careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances

in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) *Acts and omissions aided or abetted by the defendant*

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of defendant who transports a suitcase

knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative

provisions under which such accountability might be established.

(b) *Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken activity and reasonably foreseeable*

(1) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking

of money was the specific objective of the jointly undertaken criminal activity).

(c) *Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity*

(1) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant C (*i.e.*, the forgery of the $828 check).

(2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.

(3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (*see* the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and

resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (*i.e.*, the one delivery).

(6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint

undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defedant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

3. "Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example,

where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which § 3D1.2

(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

4. "Harm" includes bodily injury, monetary loss, property damage and any resulting harm.

5. If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.*, § 2K1.4 (Arson; Property Damage by Use of Explosives); § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.*, § 242.2 (Aggravated Assault); § 2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.*, § 2F1.1 (Fraud and Deceit); § 2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. *See generally* § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level

should be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

6. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in § 2S1.1, subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in § 2A3.4(a)(2) ("If the offense was committed by the means set forth in 18 U.S.C. § 2242").

An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, § 2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18

U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).

7. In the case of a partially completed offense (*e.g.*, an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 in the Commentary to § 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under § 2X1.1(c)(1).

8. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and *modus operandi*. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is

counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is asserted by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; *see* § 4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

9. "Common scheme or plan" and "same course of conduct" are two closely related concepts.

(A) *Common scheme or plan.* For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi.* For example, the conduct of five defendants who together defrauded a group of investors by com-

puter manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of *modus operandi* (the same or similar computer manipulations were used to execute the scheme).

(B) *Same course of conduct.* Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant's failure to file tax returns in three consecu-

tive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

10. In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas § 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by § 1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot

readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guide-

line. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; § 2K1.4 (Arson; roperty Damage By Use of Explosives) specifies consideration of the risk of harm created.

Section 1B1.4 of the Sentencing Guidelines provides:

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not

take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).

Section 2D1.1 of the Sentencing Guidelines provides in pertinent part:

§ 2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

[Subsection (c) (Drug Quantity Table) omitted in printing.]

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder

under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), 960(a), (b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

* * * *

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to § 1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to § 2D1.1; *see* §§ 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).

* * * *

6. Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

* * * *

12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

    If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

    In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 405017 40130